A UNITED STATES OF EUROPE? MAPPING AND DESIGNING CONSTITUTION-MAKING FOR EUROPE

¿Unos Estados Unidos de Europa? Mapeando y diseñando un proceso constituyente para Europa

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Abstract

In recent times, scholars, public intellectuals, political and social movements and prominent European political leaders of different ideological orientations have called for a United States of Europe. From their point of view, facing the EU legitimacy crisis requires a democratic renewal through a constituent process. However, these statements have not been accompanied by a specific design on how to institute this new European Constitution. To discuss possible ways to operationalize this idea, this paper presents the chief formulations of the European constituent power and its translation into a concrete constitution-making design.

Keywords

European Union; constituent power; constitution-making; treaty revision; democratic legitimacy.

Resumen

En los últimos tiempos, académicos, intelectuales públicos, movimientos políticos y sociales y destacados líderes políticos europeos de diferentes orientaciones ideológicas han hecho un llamamiento a la creación de unos Estados Unidos de Europa. Desde su punto de vista, enfrentar la crisis de legitimidad de la UE requiere una renovación democrática a través de un proceso constituyente. Sin embargo, estas declaraciones no han sido acompañadas por un diseño específico sobre cómo instituir esta nueva Constitución Europea. Con el objeto de discutir las posibles vías de poner en práctica esta idea, este artículo presenta las principales formulaciones del poder constituyente europeo y su traducción a un diseño concreto de *constitution-making*.

Palabras clave

Unión Europea; poder constituyente; constitution-making; reforma de los tratados; legitimidad democrática.

I. INTRODUCTION

"It [is not] possible to ignore the fact that they do tend to undermine the loyalty of large segments of the population. How else, indeed, might one explain such highly visible developments as the revival of extreme right-wing populism, the rampant egotism of most interest groups and the burgeoning of identity politics and xenophobia." This statement, which could have well been made in any current public media or in any of the many articles and books dedicated to the crisis of the European Union and the emergence of populist options, was made twenty years ago by Giuseppe Federico Mancini (1998, 39), judge of the Court of Justice of the European Communities at the time. Twenty years later, the European political situation, far from improving, has worsened considerably. Hence, as highlighted by the European Court of Human Rights judge, García de Enterría, linked as the latter to Harvard Law School, "once it has become widespread until its practical exhaustion the Monnet method of partial integrations, far beyond what its own author could have believed, the objective would be to adopt the system that two centuries ago was assumed by all Western States to form political units able to effectively serve the values of freedom, equality and solidarity: the system of a Constitution" (1995, 11).

In this vein, some scholars, public intellectuals and social movements have been pointing out in recent times that facing a crisis of these characteristics requires a constituent renewal through a democratic process (Patberg 2018). Moreover, prominent European political leaders of different ideological orientations have pointed out its convenience or have been doing so for some time. This is the case, for example, of Martin Schulz (Oltermann 2017), Guy Verhofstadt (The Spinelli Group 2013; Verhofstadt 2006, 71), Yanis Varoufakis[1] or, in a less direct way,

[1] See European Spring electoral program for the 2019 European elections, https://europeanspring.net/wp-content/uploads/2019/01/EuropeanSpring-Manifesto.ENG_.pdf

Emmanuel Macron.[2] The political argument is clear: only through a rapprochement between political elites and the people and the collaborative construction of a common project it is possible to regain the confidence of the vast majorities of the EU citizens. The European federal State that will result is, according to these authors and political figures, the only way to resist the permanent extortion and attacks on governments by transnational capital and to enable an alternative to the multiplicity of pressing global challenges that we are facing. As Habermas sums it up: "the globalization of commerce and communication, of economic production and finance, of the spread of technology and weapons, and above all of ecological and military risks, poses problems that can no longer be solved within the framework of nation-states or by the traditional methods of agreement between sovereign states" (1998, 106). The Coronavirus outbreak, in this sense, clearly evidence unresolved tensions that may accelerate the decomposition of the European integration project if bold measures are not taken (Moreno González 2020, 5). As the Governor of the Bank of Spain summed it up, "If not now, when?" (Hernández de Cos 2020).

Legally speaking, there are strong arguments that reinforces this constitutional-building strategy. First of all, if we accept that the Union's legitimacy nucleus emerges from the democratic constitutional States, the integration process has proven its inability to cover up the construction of the Union together with the social constitutionalism (Moreno González 2019, 2017; Maestro Buelga 2017; Monereo Pérez 2014). There is a decoupling between the social constitutions of the Members States, legitimized through the exercise of the democratic constituent power, and the European primary law, that in spite of being superior to the national laws of Member States has not emerged as a direct mandate of the European people. This "clandestine loss of powers" (Grimm 2017, 6) and "deconstitutionalization process" (De Cabo Martín 2009, 106) of the EU Member States, orchestrated by an intergovernmental construction process of the Treaties and consolidated through a process of "judicial liberalization" (Scharpf 2017, 319), whose main objective is to verify the consistency and subjection of national rules in relation to EU's economic freedoms (Menéndez 2011, 38, 2017; Aguilar Calahorro 2014; Hinajeros 2015), enters into direct contradiction with the constitutions of the

From a close ideological perspective, see (Martelli 2013) and (Negri and Sánchez Cedillo 2015)

[2] Commission des Affaires Européennes, "Groupe de Travail Sur Les Conventiones Démocratiques de Refondation de l'Europe," 2017 (Commission des Affaires Européennes 2017)and Les Consultations citoyennes sur l'Europe, https://www.toute-leurope.eu/consultations-citoyennes.html (last visited Jan 10, 2019).

Member States (Grimm 2017, 13) and is based on the European Court of Justice's interpretation of an alleged European constituent will that has never been expressed. All this, added to the lack of a unified labor and fiscal policy (F. Fabbrini 2014; Von Rompuy 2012), diminishes the possibilities of democratic action by hindering the creation of an alternative citizens' will. This, on the one hand, favors the ability of European capital to act since it has subjective rights recognized that can be asserted before the European Court of Justice against possible Keynesian economic policies and regulatory developments regarding the protection of social and labor rights (Bugaric 2013; Poiares Maduro 1998). On the other hand, correlatively, the possibilities of democratic institutions to tame the European "savage powers" (Ferrajoli 2011), diminish.

The authors and politicians that defend the idea of federalizing Europe are well aware of the wide range of economic, social, cultural, geopolitical, political and legal difficulties that makes their project a very complex political undertaking. However, as stressed by Streeck (2017, 2016), they consider that what is completely unrealistic is that the EU will last much longer if the present *status quo* is maintained. They reckon that the controlled dismantling of European welfare systems is fostering a radicalization of political positions in which the European Union is perceived as one of the main culprits. In their view, the division between creditor and debtor States caused by the conversion of private debt into public debt, and the social and fiscal dumping problems due to the lack of unified labor and fiscal legislation, with the correlative weakening of the institutions' capacity for action and the strengthening of the power of the European big capital (Fossum and Menéndez 2012, 22), generates, especially in the central countries of the Union, a growing rise of exclusionary nationalist positions that pillory the European integration process.

To put it bluntly, from the federalists perspective, the Union is facing a quandary between the continuity of an elitist model that is the breeding ground for the rise of Eurosceptic populism, the return to the framework of political action in the Nation-State raised by some left (Lapavitsas 2017) and right-wing (Hooghe 2007) theorists [which, in a context of inability from the state framework to face the complex dynamics and problems of global capital, would arouse the tensions between the European states so characteristic of the continent's history (Eriksen and Fossum 2012)] and the deepening in a democratic and constitutional style of the integration process. Clement Attlee summed up this point of view when he stated, in 1939, that "Europe must federate or perish"[3]. Brexit is, from this point of view, a serious warning

[3] Regarding the rich and intense debate in the British Parliament about the possibility of a European integration in a federal style during the 40s in the last century, see Haapala and Häkkinen (2017).

about the possibilities of reversion and irreversibility of the integration project. Nevertheless, the federalists perceive that this major crisis of legitimacy leaves the door open to a deep reconstruction and widening of the democratic constitutional project, crystallized in the constitutions following the Second World War. In this sense, only the expansion of a supranational civic solidarity through a democratic deepening of the project of European integration could stop the divergence and the conflict between peoples that generates exclusive nationalism (Habermas 2015, 549; Ferrajoli 2019, 99).

The idea of having a constituent moment to proceed with the construction of a European federal State is by no means a novel idea in legal doctrine nor in European political and philosophical thought. On the contrary, this idea is present, at least, from the 17th Century and has been defended by thinkers as William Penn, the Abbé de Saint-Pierre, Immanuel Kant, Víctor Hugo or José Ortega y Gasset (Renouvin 1949). At the time of the Aftermath of World War II, with the first debates about European integration, the strategic division was not about the construction of a European federal State, but on the ways to achieve that objective. While radical federalists encouraged its quick creation, functionalist federalists, like Jean Monnet, advocated a gradual conversion to a federal State, the "small steps" approach, conforming first a European common identity and granting the cohesion of the European peoples through the articulation of common interests. The failure of the federalist European Political Community in 1954 paved the way for the functionalist strategy until today (Viciano Pastor 2001, 91; Griffiths 2000).

Some authors, noting that Monnet functionalist method is exhausted, point out the need to initiate a process to deeply reform the Treaties so as to delve into the process of European integration with the aim of improving the institutional architecture of the Union and solving their democratic deficiencies (García Roca and Martínez Lago 2014; Monereo Pérez 2014; Porras Ramírez 2014; Pérez de las Heras 2010). Other scholars, with the objective of laying the foundations of a European federal structure, indicate some of the key aspects and principles that, in their opinion, should guide an eventual reform or constituent process (Marti 2008; S. Fabbrini 2015b; Ferrajoli 2019, 96). Nevertheless, to my knowledge, no concrete proposal for an eventual European constituent process design has been suggested from the academy, which is striking after all the development of the constitution-making theory of the last two decades (Tushnet 2013; Blount, Elkins, and Ginsburg 2012; Elster 2012; Eisenstadt, Levan, and Maboudi 2017; Arato 2017; Böckenförde, Hedling, and Wahiu 2011; Brandt et al. 2011; Braver 2017; Banks 2008; Colón-Ríos 2011; Hart 2003; Landau 2013; Saunders 2012). Accordingly, the public and academic debate should be encouraged by setting out concrete political and legal ways that formalize these statements. To do so, this paper begins presenting the chief formulations of the European

constituent power and its translation into a concrete constitution-making design. I uphold, in a second part, that the classical concept of *pouvoir constituant* is the most consistent with a democratic theory of the Constitution and I suggest that the European constituent power should be activated through a similar mechanism that the one lay down in the article V of the US Constitution and express itself without the constraints of the national constitutional systems, in a constituent assembly exclusively composed by directly elected members. Moreover, I maintain that this process should be guided by the principles of participation, transparency and inclusivity. By doing so, I try to answer the questions raised by Patberg (2017, 210) regarding the connections between the constitutions of the Member States, the new European constitutional text, and the form the activation of constituent power should be adopted at the European level.

II. DIFFERENT CONCEPTIONS OF THE EUROPEAN *POUVOIR CONSTITUENT*

The key question that needs a theoretical response in order to operationalize the design of a constituent process in the EU, is about the autonomy or heteronomy of EU law. If it is deemed autonomous, the citizens of the Union constitute the European constituent power. On the contrary, if it is defended that it is heteronomous, the Member States are the subjects of the European constituent power (Möellers 2010, 185). Hence, we have three possibilities of understanding the European constituent power depending on where we locate the subject of the constituent power. First, we will see the two possibilities that have being exercised in practice: the intergovernmental conception of the European constituent power, that has been put on practice since the beginning of the integration process; and the habermasian conception of *pouvoir constituant mixte*, that we can partially illustrate with the Convention for the Future of Europe in 2003-2004, whose purpose was to draft a Constitution for the EU. The first of these possibilities, as I will show, is clearly exhausted. As for the second one, as is widely known, it has been a failure. Therefore, if we accept that the EU needs a constitutional and democratic renewal, there is only one way left for activating the constituent power in the EU, putting in its center not the States but the citizens.

1. *EU intergovernmental Treaties-building: Monnet functionalist method*

Usually, scholars depict a Constitution as the set of fundamental norms that characterize any legal order: the regulation of the organization of the State and the exercise of state power, the conformation of the bodies that exercise State power, the regulation of the relations between State and citizens and the values

and principles that inform the entire legal system. From this point of view, every State necessarily has its own constitution, regardless of whether it is a more or less liberal text or its form of elaboration is more or less democratic (Guastini 2001, 2009). In this vein, most of EU law scholars assume that EU primary law is a constitution as it is an autonomous legal order that has primacy over the national law, is directly applicable, has a charter of fundamental rights that sets out all the rights enjoyed by EU citizens, and creates and regulates a series of institutions (Weiler 1991; Craig 2011; Scarlatti 2010). This conception of the EU Constitution implies a constituent power that situates at its core the Member States. As Patberg sums it up, "constituent power simply becomes a synonym for the treaty-making competence of sovereign nation-states" (2018, 265). Hence, it is common to portray the Member States as the "masters of the treaties", as coined by the German Constitutional Court in its Maastricht ruling of October 12 1993, or to depict the European Council, the EU institution that is formed by of the Heads of State or Government of the Member States, as the "constitutional architect" of the EU (Wessels 2016, 104). With regard to the participation of European citizens, even if it takes place *a posteriori,* on *faits accomplis*, and is always mediated by the internal regulation of the Member States, as EU citizens have in some occasions directly participated in the ratification of the Treaties and always indirectly by requiring the approval of national parliaments, the majority of the doctrine considers that it is possible to speak of a European constituent power configured in such a way (Preuß 2011).

In addition, EU so-called constitutionalisation was consolidated by another key actor authorized by the Member States, the Court of Justice (Marti 2013, 316; Mancini 1989). Two decisions of the Court from 1963 (*Van Gent en Loos*) and 1964 (*Costa v. ENEL*) enshrined the principles of primacy and direct applicability of the community law. From there, the construction of EU constitutional edifice has been deeply intertwined with the legitimizing role of the Court. This have been like that to the extent that the Court stated in 1986 (*Les Verts v. European Parliament*) that "'the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty". Since then, the majority of EU law doctrine assume the equivalence between the Treaties as an EU Constitution.

In recent years, this form of intergovernmental integration has deepened in the wake of the economic crisis and the progressive configuration of the new European economic governance. Some commentators note that this process has sharpened the process of the de-democratization of the Union. Under the umbrella of permanent economic emergency, the intergovernmental pillar of the Union has been significantly strengthened (Puetter and Fabbrini 2016; S. Fabbrini 2013, 2015a), with the European Council playing a central role

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(Carammia, Princen, and Timmermans 2016; Puetter 2012; Wessels 2012). That is why the EU decision-making process has been described as "executive federalism" (Habermas 2012, 337), "authoritarian managerialism" (Joerges 2015, 218) or "executive dominance" (Curtin 2014). This predominance of the European Council has fostered the development of a procedural strategy that allows the governments of the Member States, on the one hand, to circumvent the controls and the possible opposition of the national and European representative institutions, and, on the other hand, escape the formal and material requirements of the EU law. The same governments that approve the implementation of policies in the European Council that are difficult to justify internally, utilize the EU as a scapegoat for the development of such policies.

Furthermore, the management of the economic crisis has resulted in the deep transformation of the economic constitution of the Union without proceeding to the corresponding Treaties reforms. According to the Treaties, the fundamental objective of the EMU is price stability. Nonetheless, the new economic governance measures have added financial and budgetary stability with the same rank of importance and have altered the distribution of competences. On the other hand, the adoption of international treaties outside European Union Law, the Fiscal Compact and the Treaty Establishing the European Stability Mechanism (Bressanelli and Chelotti 2016; Bocquillon and Dobbels 2014), makes it increasingly difficult to speak of the European Union as a Union (Dawson 2015; Linde Paniagua 2012). As highlighted by Fabbrini, "the Lisbon Treaty has institutionalized a dual constitution with related decision-making regimes (supranational regarding the policies of the single market and intergovernmental regarding inter alia economic and financial policies)" (2013, 1005).

All this has occurred without a public debate process and the direct acquiescence of the European citizens to endorse a constitutional text configured in such a way. It is therefore necessary to consider to what extent the integration process should continue to be built on intergovernmental and technocratic acts (Habermas 2015; Sánchez-Cuenca 2017; Scicluna 2015; Schimmelfennig 2015) without the direct acquiescence of the European peoples, thus producing an appropriation on the part of the institutions of the Union of the European constituent power. This explosive cocktail is directly related with the growth of far-right Eurosceptic political forces and Brexit (Walker 2016), demonstrating, therefore, that the intergovernmental method of integration has been exhausted.

2. *The* pouvoir constituant mixte *and the Treaty establishing a Constitution for Europe*

According to Habermas (2017, 2015), both answers are valid to solve the quandary that we initially posed: EU law may be deemed autonomous and

heterogenous. Following his point of view, which illustrates through a hypothetical and past European constituent assembly, the integration process is the result of a *pouvoir constituant mixte*, an expression of popular sovereignty shared among European citizens as a whole and citizens in their capacity as citizens of Member States.[4] This approach allows Habermas to square the ideological assumptions he is based on: the maintenance of positivized achievements in the constitutions of the social State and a political, social, economic and fiscal unification process in such a way to establish a transnational democracy that is not organized as a federal state.

The alteration made by Habermas of the pure constituent power theory is built as a circular fallacy to justify a previous ideological position. But, in addition, the presumption that the outcome of the process must necessarily be linked to the past constituent power whose will was reflected in the constitutions of the Member States implies cutting off the disruptive potential of the constituent power, depriving it of its eminently sovereign nature, and consequently, taking any democratic content out of the concept. That reliance on the past that Habermas contemplates, as Niesen (2017, 190) points out, cannot be argued to stop the constituent power's freedom to reinvent itself. Furthermore, avoiding any connection of the constituent assembly's work with the constitutions of the Member States would enliven the debate's politicization, the conflict would be made explicit and the creation of a public sphere of debate at European level would be encouraged.

One may also ask, in accordance with the idea of connecting the future text to the constitutions of the Member States, how to proceed in order to scrutinize that the resulting text does not contradict them. Should the CJEU undertake material control of the Constitution, as did, for example, the South African Constitutional Court in 1996? According to the CJEU's judgment established in the *Pringle* case (para. 30 et seq.), the Court has no competence to control an ordinary reform of the Treaties as this are acts adopted by a Convention or an Intergovernmental Conference. In this sense, Habermas' approach reaffirms a distrust in popular will, as it defends that a court could restrict it. Ratifying the Constitution is a task that must correspond exclusively to citizens. A body whose legitimacy derives from the citizenry cannot overcome its will.

Marti (2008, 621) has developed the general guidelines of the eventual design of a constituent process, based on similar assumptions to those of Habermas. From her point of view, an eventual constituent convention must be composed of the two sources of legitimacy of the future European federation, the peoples and the States. In this way, the seats in the convention must

[4] This idea of "double legitimacy" or of "dual constituent subject" is already found in García de Enterría (1995, 21) and De Carreras Serra (1995, 206).

be held by deputies of national parliaments or members of governments and representatives directly elected by citizens. Similarly, she also states that European Union institutions must also be involved, in order to provide a more practical and technical perspective. In her opinion, the distribution of seats among the government or parliament representatives and those directly elected must be egalitarian, while the representatives of the European institutions should have a lower number of votes.

Marti's proposal of an EU constituent-process design differs with the process that culminated in 2005 with the rejection of the Treaty establishing a Constitution for Europe in that the constitutional convention should have the last word and no intergovernmental conference with the power to modify the text resulting from the convention should play any role. This aspect of the constitution-making design corresponds with the theory of constituent power and people's sovereignty, as understood in the US from the first constitution-making processes in the revolutionary moment (Fritz 2008). However, from this point of view, it is not possible to defend that, in the style of the European Convention of 2002-2003, representatives of the European Parliament and national parliaments, governments, the Committee of the Regions and the Economic and Social Committee should hold a position (Porras Ramírez 2014, 218), or that only some of the members of the constituent assembly should be directly elected (Marti 2008, 621). In this sense, without even realizing it, Valéry Giscard d'Estaing was absolutely right when he described the works of the 2002-2003 European Convention as "our Philadelphia" (Scicluna 2015, 54). The metaphor applies. Indeed, the Constitution of the United States was the result of a non-democratic and opaque process, which today the citizens of consolidated democracies would deem to be hardly acceptable (Tushnet 2013, 1994). The indirect election of the 55 delegates nominated by the legislatures of the different States, the granting of the same vote weight to each State regardless of their size, or the impossibility of knowing the content of the deliberations [in spite of the suffocating heat in Philadelphia in the summer of 1787, the windows of the Independence Hall were kept closed so that nobody could see or hear what was being discussed (Lepore 2018, xi)] are elements that certainly remind us of certain phases of the failed European process.

In essence, three design errors can be highlighted in the process. Firstly, the members of the Convention on the Future of Europe were indirectly elected, drawing out the logic of the Philadelphia Convention, the 1945 Indian Constituent Assembly, where most of the constituents were elected by provincial assemblies, or the Bonn's *Parlamentarischer Rat* that drafted and passed the Basic Law for the Federal Republic of Germany, where the constituents were elected by the legislative bodies of the States. Dividing them into two categories necessarily entails the indirect election of State

representatives who have not been directly elected for that task. Indeed, the indirect election of representatives is, along with other mechanisms such as the bicameral system or the restricted suffrage, one of the aristocratic mechanisms that moderate the eventual democratic excesses unwanted by the political and economic elites (Elster 1997, 130). Secondly, the Intergovernmental Conference, which followed the Convention's works, was entitled to modify and adopt the text approved by the latter. As a result, the Convention developed its work considering its subsequent acceptance by governments, rather than by citizens. Last but not least, although it was stressed that the process had been opened to the participation of civil society, most of the NGOs that participated in the process were directly financed by European Union institutions or projects (Scicluna 2015, 54). What is more, despite the constituent rhetoric, it was a process that ended up being hardly transparent given its intergovernmentalization.

In sum, the works of the Convention were not the result of a constituent moment and a broad debate throughout the continent, and neither did it comply with the formal requirements for the activation of the constituent power, that is, the election of a constituent assembly composed only by representatives directly elected and, therefore, established to represent the European constituent power (Viciano Pastor 2001). The rejection of the Treaty establishing a Constitution for Europe by French and Dutch citizens in 2005 showed that this elitist and barely democratic way of operating has great difficulties to prosper and it is not a suitable way to solve the existing problems of crisis of democratic legitimacy.

3. *The classical and democratic concept of* pouvoir constituant*: A European constituent assembly*

As I have shown, the two ways of understanding the constituent power in the EU that have been put into practice, clearly elitist and scarcely democratic, does not work. Accepting that the EU needs a constitutional renewal, the only way left is the one that situates citizens as the only protagonists of the EU constituent power. According to the classical and democratic conception of the constituent power, it can be defined as the power that in a given moment has the legitimacy to establish a new constitution. It is characterized by being: 1) an original power, not depending on any previous power; 2) an initial power since its impulse depends solely on it; 3) a founding power as it implies a break with the previous legal-political order; 4) an unconditioned, unlimited, sovereign power and, consequently, prejudicial; 5) only based on democratic legitimacy (De Cabo Martín 2003, 31). It can only be spoken, in purity, of Constitution, when it emanates from the constituent power, that is, when it has been adopted through direct expression of popular sovereignty,

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verifying the adequacy between popular will and constitutional text. Otherwise, it could be considered as a Basic Law, as in the German case, but it would not be correct to use the term Constitution. The identification between the concept of Constitution and the direct participation of the citizens is at the very roots of the idea of Constitution since the Constitution of Massachusetts was widely debated and subsequently ratified in the towns and cities of Massachusetts in 1780 (Handlin and Handlin 1966).

The practical implications of this conceptualization are crucial. As is not possible to describe the Treaties as a Constitution insofar as they are not the consequence of a constituent act (Díez-Picazo Giménez 1993), inasmuch as only through the intervention of the constituent power it is possible to create a political union (Jimena Quesada and Tajadura Tejada 2015; Patberg 2016),[5] and accepting that this is the only way left to develop a constituent process in a democratic way, the design of the process requires exercising the people's constituent power through an *ad hoc* constituent body and introducing participatory mechanisms in order to guarantee that the Constitution is the reflect of the people's will and not of the political elites. Therewith, it is possible to fulfill the foundational requirement of the idea of Constitution, and therefore the most important one: The Constitution as a legal-political framework established by citizens to limit the exercise of political power. The fundamental idea of the Constitution is not, although it seems at first sight, its legal effectiveness or its supreme position in the legal system that it originates. This has also been achieved by the self-proclaimed constitutions that conceal authoritarian regimes and that have been elaborated by the political power itself to mask its position of domination. That can also be achieved by a community treaty or any treaty that establishes an international organization. But in these two cases there is no direct limitation by citizens of political power (Viciano Pastor 2001, 98). In this sense, in the second part of this article, I develop, following the work of some constitution-making scholars, a constituent process design for the EU in accordance with the classical and democratic constituent power theory.

III. THE DESIGN OF A DEMOCRATIC AND PARTICIPATORY EUROPEAN CONSTITUENT PROCESS

From a political point of view, although the United Kingdom's departure from the Union can be analyzed as an opportunity to deepen the integration

[5] In this sense, the *Bundesverfassungsgericht,* in its judgment on the compatibility of the Treaty of Lisbon with the Bonn Basic Law, determined that, if we went further into the integration path towards the construction of a European federal State, the German constituent power should express itself directly.

process, its traditional Nordic partners and other Member States with clearly Eurosceptic governments are a political hindrance that hampers or prevents, for now, thinking about an eventual constituent process that can count on the approval of all governments and peoples of the Union.[6] Even if, *a priori,* some governments might be inclined to favor the eventual opening of a constituent process that culminates in the founding of a European federal state, they could end up seeking to stop such integration due to a dilution in their sovereignty and leading role in the federation. Therefore, the first problem to face, when solving the possibilities of an eventual opening of a European constituent process, is to determine whether all Member States of the Union can or should federate, or, on the contrary, whether the federating path should be left open only to those Member States that wish to do so. It is clear that, given the internal correlation of political forces in many of the Member States, transforming the EU into a federation is currently impossible. In this sense, at least for the time being, there is no point in continuing to explore this possibility and it must be only considered the option of federating a smaller number of Member States. Hence, assuming that the future federation, if it were to exist, will be composed only of some of the Member States and not by all, different potential mechanisms can be considered for activating the European constituent power according to a democratic theorization of the constituent power.

1. *Activating the European constituent power*

Let us see which particular paths could be chosen to activate in Europe the constituent power according to its classic and democratic theorization. I discard analyzing here the political options that can be proposed to proceed to an original activation of the European constituent power. There is a broad range of forms of social and political pressure that could be activated: collecting signatures through the European citizens' initiative,[7] a *Spitzenkandi-*

[6] A recent survey questioning the citizens of six Member States about the potential creation of a European federal state points out the differences of opinion between the German and French citizens, mostly favorable or without an opinion in this regard, and those of the Nordic states (Sweden, Finland, Denmark, Norway), mostly unfavorable.

[7] This path is not exempt of legal and political problems. It is not possible, according to the present regulation, to request the Commission to carry out a referendum at the Union level since no referendum mechanism is foreseen in the Treaties. Moreover, according to the Commission, is not viable to reform the Treaties by means of a European citizens' initiative. Hence, the registration of some initiatives, such as the one which sought the introduction of a referendum mechanism at the European level, have been denied (Fernández Le Gal 2018, 19; Vázquez Rodríguez 2017, 165). Even if we accept that is legally possible to going down this path, as the Committee of the Regions and various members

daten reaching the presidency of the Commission having as central point in its program the call for a consultation at European level about the opening of a constituent process, or as proposed by Jimena Quesada and Tajadura Tejada (2015, 50), noting that it would imply a breach of current legislation, the European Parliament's call for a constituent opening referendum.

My objective here is to propose two specific alternatives according to which the States would commit themselves to establish a mechanism that allows the opening of a constituent process. First, this commitment can be formalized through the ordinary reform procedure established in Article 48 TEU. A review of the reform procedure itself can be considered as a result of the momentum of the Government of any Member State, the European Parliament or the Commission. To facilitate procedures, significantly shorten the time to adopt the reform and avoid the need for different institutions to reach agreements, it is appropriate, in accordance with the possibility established in the Treaty, not to proceed with the call for a convention. The reform of the reform procedure is not a minor issue at all. However, it is not intended to avoid the future call for a convention or for a constituent assembly that requires broad agreements among different political positions, but, on the contrary, to contribute to make it happen. The possible need to reform Article 52 TEU due to the Brexit may even be exploited to proceed with such reform (F. Fabbrini 2017).

Secondly, in line with the procedures for adopting the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union and the Treaty Establishing the European Stability Mechanism, and in a similar vein to the legal proposal of Jean-Claude Piris (2012, 121) for achieving a two-speed Europe, an international treaty outside European Union Law could be signed among the Member States that wish to do so. The advantage of this procedure over that of the ordinary reform of Treaties is that it allows to introduce the mechanism without the need for the approval of all the Member States and, therefore, to circumvent the requirement of unanimity. Likewise, in line with the TSCG, it allows European institutions, notably the CJEU, to play a surveillance role of what is agreed. On the contrary, carrying out a procedure of this kind outside European Union Law, regardless of any eventual litigation that might arise in the CJEU, leaves the door closed for the citizens of the States that do not sign the Treaty to request, through the mechanism of

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of the European Parliament's Committee on Constitutional Affairs and the European Parliament's Committee on Petitions sustained in the debates about the new European citizens' initiative regulation, the Commission is not compelled to sponsor a legal act in response to a citizens' initiative. This implies that, even if the Commission allows the registration of an initiative whose purpose is the aforementioned purposes, depending on its political correlation of forces, it may not prosper.

citizen initiative that will be explained below, the participation of their State in the constituent assembly. In this sense, it might be convenient to first try to sound out the first option, and if it does not work out, to opt for this path.

In either case, I believe that a mechanism should be generated, which would be added to Article 48 TEU or that would give content to the new international treaty, according to which, in a similar manner of the Article V of the Constitution of the United States, a constituent assembly should convene if half of the Member States approve the opening of a constituent process through an internal referendum. As in the US, it would be not necessary for the States to approve it at the same time and each State could withdraw its proposal whenever it wishes to do so. It would also be appropriate that the Member States introduce into their constitutions a mechanism according to which citizens would also have the possibility of activating the referendum to launch the process. This commitment to introduce a European constituent initiative clause could be part of the agreement that will be adopted within the European Council at the time of reforming the TEU. Or, it could be established at the new international treaty in the same way as it was done in the TSCG, according to which the signatory States committed themselves, within a period not exceeding one year after the entry into force of the treaty, to introduce the golden rule in its domestic legal system, preferably in its Constitution, an introduction whose compliance could be controlled by the CJEU.

Hence, I partially agree with Fabbrini (2015b, 278) when he propounds that the European Constitution should be drawn up by a convention preceded by a pre-constitutional agreement signed by the elites of the countries that commit themselves to participate in the project to define the objectives of the Constitution and the procedure to approve it. Indeed, in accordance with the two proposed paths, a commitment must be made by the elites of the Member States to reform the TEU or to sign an international treaty. Nevertheless, the commitment to participate in an eventual constituent process cannot be a consequence of the will of elites, but of that of citizens. In this way, a real conformity would be guaranteed and the contours of the European constituent power would be delimited.

2. *Functioning of the European constituent assembly*

According to Rodrik (2018, 77), we could be facing the last opportunity to drive an alternative project for European integration. The enthusiasm for the European project could only be sharpen through a broad democratic deliberation, breaking the remoteness or perception of distance, of a significant part of European citizens regarding the project and the European institutions. Therefore, one of the main elements of the process must be the

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broadness of democratic participation mechanisms and their transparency. As expressed by Moëllers: "A real constitution […] should not be the result of an intergovernmental pork barrel compromise but a genuine deliberative procedure: Habermasian virtues instead of intergovernamental vice" (2010, 201).

The debate on citizen participation in constituent processes has captured much of the attention of researchers specializing in constitution-making (González Cadenas 2018, 187). Among the virtues attributed to it, it is worth noting, first, the increase in the legitimacy of the origin of the future Constitution (Martínez Dalmau 2014) and the political system (Eisenstadt, Levan, and Maboudi 2017), which in turn leads to an increased longevity (Elkins, Ginsburg, and Melton 2009, 207) of the former and stability of the latter. Likewise, it is emphasized that citizens' control and pressure prevent, on the one hand, the adoption of provisions that delimit democratic rights and freedoms (Voigt 2003; Samuels 2006) and, on the other hand, encourage the introduction of regulations that guarantee them together with precepts and innovative mechanisms that go beyond the political agenda of the ruling elites and traditional constitutional solutions (Ghai and Galli, 2006; Hart, 2010, p. 41; Aparicio Wilhelmi, 2011, p. 9; Viciano Pastor and Martínez Dalmau, 2011, p. 23). The participatory dynamic itself promotes becoming familiar with the Constitution and makes it easier for citizens to make a tool of it to defend and exercise their rights (Haysom 2003; Widner 2008, 1519). Equally, citizen participation encourages the inclusion of new players, movements and social organizations in public life beyond political parties, generating a greater level of pluralism (Landau 2013) that, in turn, favors dialog and the achievement of agreements that can contribute to closing past wounds, resolving conflicts and reducing the gap between different social sectors (Benomar 2004, 88; Samuels 2006, 4).

The other side of the coin of participatory processes is transparency. A participatory process cannot perform correctly if the level of transparency is not sufficiently high. On the one hand, it limits the role of powerful lobbyists behind the scenes by allowing citizens to know what they are proposing. On the other hand, it allows citizens to control, restrain and propose alternatives (Colón-Ríos 2011). Likewise, transparency in the process entails a greater connection of constituents with popular feeling (Elster 1998, 111).

In this vein, the procedure for drafting the constitutional draft that was carried out in the Constitutional Council of Iceland in 2011 is very illustrative (Landemore 2015; González Cadenas 2015). In an innovative way, the draft constitution was drafted progressively, making public progress periodically and allowing citizens to better control developments in the process and interact more directly with their representatives. Similarly, the periodic publication of the draft in the media, which was set weekly in Iceland, entailed a

greater social debate, interest in the process, and a better knowledge of the constitution.

3. *The referendum for ratifying the constitutional text*

From the classical and democratic constituent power prism, the convenience of a constitutional referendum is undisputed as a Constitution must be the reflection of the popular will. Hence, the constitution-making process cannot remain framed within the game of political elites and citizens must necessarily have the last word (Colón-Ríos 2011, 35). Moreover, constitutional referendums are an instrument that prevents constituted powers from adopting certain precepts contrary to popular will or that do not coincide with the promises made in the electoral campaign (Contreras Casado 2017, 70; García-Escudero Márquez 2008, 190). They have the virtue, to put it another way, to encourage constituents to seek common positions and introduce precepts close to the popular feeling (Ghai 2006, 37; Blount, Elkins, and Ginsburg 2012, 218). While it is true that some constitutions that have not been approved in a referendum, such as the Japanese and German constitutions, have been highly legitimate, the fact that citizens have the final say on the text favors its legitimacy and, therefore, an increased sense of belonging, the so-called constitutional feeling (Loewenstein 1986, 200).

Citizens who make up the European constituent power will be those who, without renouncing their national constituent power during the process, agree to limit it in the referendum to ratify the new constitutional text. From this point of view, the referendum should be held at the level of all the participating States and approved by an absolute majority of the votes. States that do not ratify the text will be excluded from the future federation, provided that it is formed with the approval of a clear majority of the States participating in the constituent assembly.

On the other hand, although the final decision on the text to be submitted to referendum should fall on the representatives (not even a large number of petitioners can decide for all citizens), it seems convenient to design a popular initiative mechanism to allow a percentage of representatives and citizens who gather enough support to submit a proposal for consideration to their fellow citizens at the referendum for ratifying the constitution. This mechanism allows certain issues that are considered to be of utmost importance by citizens to be part of the social debate, instructing citizens in the matter. Furthermore, unlike the referendums for constitutional ratification that have occurred in almost all cases since the French referendum of 1793, citizens should be allowed to decide on separate issues instead of being forced to voting on bloc the constitutional text.

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IV. CONCLUSIONS AND FUTURE RESEARCH LINES

Some legal, political and economic problems indicate the quandary and the deep legitimacy crisis that the EU is facing: the exhaustion of the Monnet functionalist method, the EU legitimacy crisis, the nation-states inability to confront globalization, the contradiction between the social constitutions of the Member States and the EU primary law, the CJEU's control of conventionality without its interpretative functions being enshrined in constituent debates and the priority of the EU's economic freedoms over the constitutional social rights that diminishes the possibilities of democratic action. So as to solve these challenges, some scholars, social movements and leading political figures have proposed to initiate a democratic constituent process in the EU. If the constituent strategy is part of the solution to the highlighted problems, the key question to solve is how the European constituent power should be configured. Here there are three answers depending on where we locate the subject of the European constituent power, in the Member States or in its citizens. In spite of the laudable attempts to reconfigure the classical theory of the constituent power, *e.g.* the habermasian *pouvoir constituant mixte*, from a democratic perspective the constituent power should only rest in the shoulders of the citizens. Moreover, as I have shown, theories that locate the European constituent power totally or partially in the Member States, do not work or have not worked in practice.

At this point, the scholar debate should focus on proposing and debating a concrete design of an eventual constituent process in the EU so as to give a technical response to the pretension of some of the most prominent European political figures and to clearly depict what the path to a United States of Europe would be like. I have done this task taking as reference some works of scholars specializing in constitution-making. First, I envisaged the particular legal paths that could be chosen to activate in Europe the constituent power according to its classic and democratic theorization, an ordinary reform of the article 48 TEU or the signature of an international treaty outside EU law. In either case, the content of such a reform or international treaty may be a mechanism, that could be similar to the article V of the US Constitution, that facilitates Member States' citizens convening a constituent assembly. The guidelines of such a process should be, according to the classical and democratic theory of the constituent power, the principles of participation, transparency and inclusiveness. That means that direct participatory mechanisms should be created and that a constitutional referendum is mandatory. Moreover, an important part of constitution-making studies indicate that the future political and constitutional system will be more stable as it will be perceived as more legitimate.

In this study, I have merely raised an approach to many of the problems that will have to be addressed in order to proceed with the opening and design of a European constituent process. There is still some of unresolved or undeveloped

issues that require future studies. Substantially, a satisfactory response must be found to the relationship between the new Federal State and the European Union so as to determine whether the principle of the primacy of European Union Law continues to be observed or to what extent. As a way of solving these legal conflicts, Martin Schulz or the members of the Spinelli Group indicate that Member States that do not accept the result of the constituent convention should be automatically excluded from the Union, becoming a sort of EU associated states. Nevertheless, this option would not be possible given that, in accordance with Article 50 TEU provisions, there is no possibility of expelling a Member State. In any case, it could be suggested that the States that constitute the new federal State should leave the EU and proceed to the signing of a Treaty with the European Union to define their relations.

Another central issue to be solved is the configuration of the electoral system that will regulate the constituent assembly elections. The doctrine specializing in constitution-making agrees almost unanimously that the electoral formula must generate proportional effects in order to be able to accommodate a plurality of political sensitivities and guarantee the presence of minorities (Landau 2013, 962; Viciano Pastor 2012, 144; Böckenförde, Hedling, and Wahiu 2011, 191; Elster 1995, 367). In this vein, the electoral system should be unique and transnational lists must be set up. Likewise, I have not made reference to a whole series of detail issues that should be covered in a constituent process. Consider, for example, the debate about the specific design of mechanisms for citizen participation, the linking of citizen proposals to the work of representatives of the constituent body, the role of the media, the introduction of gender quotas, the majority required for the approval of the text by the constituent body, the quorum required to ratify the text or the transition system once the constitution enters into force. All these issues, of course, must be decided freely and without constraints by the constituent body (Patberg 2018, 268).

Nevertheless, scholars should contribute by generating theoretical analysis and providing empirical evidence on these crucial issues for the future of Europe. The role of the academia here is to offer and debate proposals in a scientific and critic way. As one of the fathers of the European integration process, Altiero Spinelli, argued in May 1982 at the Università di Padova: "until now, we could reflect and describe things. From now onwards, action, always adventurous and risky, must take the place of meditation". It should be a scientific duty to move from an analytical-deconstructive phrase to a proactive-constructive one (Chalmers, Jachtenfuchs, and Joerges 2016, 16). Additionally, it should be the goal of academia to contribute to reduce the gap between academic studies and core political issues, which in the case of the EU is way too big (Scicluna 2015, 2).

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